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Chair: Mr. Kohona ..... (Sri Lanka)

Contents

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*)

Organization of work

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The meeting was called to order at 10.05 a.m.

Agenda item 86: The scope and application of the principle of universal jurisdiction (*continued*) (A/68/113)

1. **Mr. Zemet** (Israel) said it was clear from the Secretary-General's report (A/68/113) that States held diverse views on the scope of universal jurisdiction, as reflected in the range of offences to which it was applicable under national legislation, including in some cases offences that lacked the characteristics inherent to the principle of universal jurisdiction under international law, as well as in the inconsistent definitions established by domestic legislators. For example, some States interwove the principle of universality with other principles of jurisdiction, while others did not. In the light of the diversity of views identified, it would be prudent to seek additional State reports on the topic.

2. Many States, including his own, acknowledged the importance of combating impunity and bringing the perpetrators of heinous crimes to justice. They also recognized the subsidiary nature of universal jurisdiction and the need to prevent its abuse by establishing appropriate safeguards in national legal systems, including requiring that criminal proceedings be brought by a public prosecutor and that a senior legal official authorize such proceedings in all cases based on universal jurisdiction; applying the principle only in cases where the accused was present in the forum State or where additional jurisdictional links existed; and according priority to States with primary or closer jurisdictional links to the case.

3. **Ms. Jorgji** (Albania) said that the Albanian Criminal Code established Albania's territorial jurisdiction over foreign nationals who committed an offence in the country; active personality jurisdiction for offences committed by Albanian citizens abroad; and protective jurisdiction for specific offences against the interests of the Albanian State or one of its nationals. It also stipulated, in its article 7 (a), that universal jurisdiction could be exercised by a competent national court in order to try a foreign national who was present in Albanian territory, had not been extradited, and had committed, outside Albanian territory, crimes against humanity, war crimes, genocide, crimes with terrorist purposes or torture, or one of the criminal offences which fell under the purview of Albania's criminal law pursuant to specific laws or international agreements to which Albania was a party.

4. The principle of universal jurisdiction was therefore an additional tool to help combat impunity and ensure that justice was done, by bridging the impunity gap that might exist between domestic and international criminal prosecution in cases where the State with primary responsibility to prosecute was unable or unwilling to do so. It had become clear from the Committee's discussion of the topic that the application of the principle of universal jurisdiction conflicted on some points with the principle of immunity of State officials from foreign criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) arising from treaties. Differences among States concerning the definition of universal jurisdiction had been expressed, and the importance of using the principle appropriately and not abusing it for political ends had been consistently stressed.

5. Without prejudice to the current discussions and the forthcoming work of the Working Group on the topic, the Committee should recognize its limits in dealing with such a highly complex legal issue. Her delegation therefore saw merit in the proposal that the topic should be taken up by a reliable expert body such as the International Law Commission.

6. **Mr. Gharibi** (Islamic Republic of Iran) said that a common understanding of the principle of universal jurisdiction had yet to be developed. The key question was whether and to what extent the Committee should engage in codification and development of the topic. The scope of universal jurisdiction and the conditions for its application should be determined in accordance with the relevant international treaties, taking into account fundamental principles of international law. In that regard, the opinion of some judges of the International Court of Justice, who had underscored in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (the *Arrest Warrant* case) that universal jurisdiction in absentia was unknown to international law, provided a valuable guide for identifying abuse of the principle. In their view, the exceptional cases where international treaties provided for universal jurisdiction applied only if the alleged offender was present in the territory of the forum State.

7. His delegation viewed universal jurisdiction as a treaty-based exception in the exercise of criminal

jurisdiction. The prevailing principle was that of territorial jurisdiction, which barred States from exercising criminal jurisdiction beyond their borders and was key to the principle of sovereign equality of States. Universal jurisdiction was not specifically addressed under Iranian legislation and it had never been invoked by his country's domestic courts. However, the Penal Code recognized the jurisdiction of national courts over crimes punishable under international treaties to which the Islamic Republic of Iran was a party, irrespective of the location of the crime or the nationality of the accused, provided that the accused was present in Iranian territory.

8. The Islamic Republic of Iran was a party to many international instruments, including several counter-terrorism treaties. While almost all of those instruments included the obligation to extradite or prosecute (*aut dedere aut judicare*), that concept should not be confused with the principle of universal jurisdiction. None of the bilateral agreements on extradition and mutual legal assistance concluded by his Government with other States contained any reference to universal jurisdiction.

9. The main concern with regard to the concept of universal jurisdiction was that its application could conflict with certain fundamental principles of international law, in particular the immunity of State officials from foreign criminal jurisdiction, which emanated from the sovereign equality of States. The doctrine was also said to have been used selectively. There was a continuing debate over the nature of the crimes to which such jurisdiction might apply, the conditions for and limits on its application, and the possible need for a link between the suspect and the prosecuting State and for the presence of the alleged offender in the forum State.

10. Criminal jurisdiction over foreign nationals should be exercised without bias and in good faith. It should not be applied in an arbitrary manner or violate the immunity granted under international law to Heads of State and Government, diplomatic personnel and other incumbent high-ranking officials. Leaving the interpretation of international crimes to national courts would have adverse effects on the stability and integrity of international law.

11. **Ms. Dieguez La O** (Cuba) said that the scope and application of the principle of universal jurisdiction should be discussed by all Member States within the framework of the General Assembly, with the primary aim of preventing its abuse. Her delegation reiterated its concern at the unwarranted, unilateral, selective and politically motivated exercise of that principle by the courts of developed countries against individuals or legal entities from developing countries, with no basis in any international norm or treaty. It also condemned the enactment by States of politically motivated laws directed against other States, which had harmful consequences for international relations.

12. The principle of universal jurisdiction should be exercised by national courts in strict compliance with the principles enshrined in the Charter of the United Nations, in particular the principles of sovereign equality, political independence and non-interference in the internal affairs of States. It should not be invoked to diminish respect for a country's national jurisdiction or to denigrate the integrity and values of its legal system. Its application must be limited by absolute respect for the sovereignty of States and always be supplementary to their actions and national jurisdiction; the principle should be exercised only under exceptional circumstances in which there was no other way to prevent impunity. Moreover, the absolute immunity granted under international law to Heads of State, diplomatic personnel and other incumbent high-ranking officials must not be called into question.

13. The main objective of the General Assembly's work on the topic should be to draft international norms or guidelines in order to prevent abuse of the principle and safeguard international peace and security, establishing clearly under what conditions or within which limits universal jurisdiction might be invoked, as well as the crimes to which it should be applied. In her delegation's view, universal jurisdiction should be restricted to crimes against humanity and should be applied only in cases where there was no other way to bring proceedings against the perpetrators. The prior consent of the State in which the crime had been committed, or of the State or States of which the accused was a national, should also be obtained.

14. **Mr. Banze** (Mozambique) said that the agenda item was of particular concern to African States because they had been a major target of attempts by individual judges to apply the principle of universal jurisdiction. His delegation remained alarmed at the unilateral moves to prosecute certain African leaders, in clear violation of the norms of international law. All Member States should reflect on the legal and political

consequences of such actions, since any attempt to unilaterally interpret and apply the principle was unacceptable and would endanger and disrupt the global legal system.

15. In order to gain legitimacy and universal acceptance, the application of universal jurisdiction should be regulated at the international level and should be consistent with the relevant international legal instruments and with the Charter of the United Nations, in particular its non-negotiable provisions relating to the sovereign equality of all States, non-interference in the internal affairs of States and the immunity of State officials, in particular Heads of State and Government. The international community must establish the criteria for the application of universal jurisdiction and identify the crimes subject to it and the circumstances in which it could be invoked.

16. While strongly condemning any application of the principle of universal jurisdiction that was politically motivated or did not respect the principles governing international law, his delegation recognized that it was an important tool for the prosecution of perpetrators of certain serious crimes under international treaties and that its proper application would strengthen the rule of law at the national and international levels; impunity should not be condoned or accepted. His delegation remained open to sharing information and practices with other Member States.

17. **Mr. Guibila** (Burkina Faso) said that, in view of the difficulty of bringing the perpetrators of certain serious international crimes to justice, it was appropriate that the international community was seeking to develop the principle of universal jurisdiction. While there were considerable divergences of opinion among States regarding its scope and application, every effort should be made to reach a consensus, in order to prevent the abuse and selective use of the principle for political ends, bearing in mind that its ultimate aim was to combat impunity. In that connection, the principle should be applied in respect of the most serious international crimes, in other words, those that fell within the *jus cogens* category and were subject to and punishable under treaty law or international customary law. Such crimes included genocide, war crimes, crimes against humanity, piracy, slavery and human trafficking, hostage-taking and counterfeiting. Once a consensus was reached on the crimes that were subject to universal jurisdiction, each State should adopt domestic legislation establishing procedures for the prosecution and punishment of the perpetrators.

18. In Burkina Faso, a law implementing the Rome Statute of the International Criminal Court had been adopted in 2010. As well as defining the crimes subject to that Statute, determining the relevant competent authorities and providing for punishment, it was also applicable to other crimes, such as those recognized in the 1949 Geneva Conventions and their Additional Protocols. The country's judges could therefore exercise universal jurisdiction in respect of the crimes recognized under those instruments, which were unanimously accepted by the international community.

19. The broad range of opinions on the scope and application of the principle of universal jurisdiction should not prevent the international community from working to combat impunity at the international level on the basis of traditional principles and mechanisms of criminal jurisdiction, such as the principles of territoriality and personality. In that regard, the *aut dedere aut judicare* principle should complement the principle of universal jurisdiction with a view to overcoming the difficulties associated with the prosecution and punishment of international crimes. Judicial cooperation should also be encouraged.

20. **Ms. Pham** Thi Thu Huong (Viet Nam) said that, although universal jurisdiction was recognized to be an important principle in combating impunity for the most serious international crimes, its misuse could infringe the sovereignty and political independence of States and violate the general principles enshrined in the Charter of the United Nations. Given that ongoing efforts were needed to define the principle of universal jurisdiction and its scope, her delegation called for the drafting and development of international standards or guidelines that would clearly set out the range of crimes subject to the principle and the conditions under which it could be invoked.

21. The principle must be distinguished from other related concepts such as the obligation to extradite or prosecute (*aut dedere aut judicare*). Due attention should also be paid to the link between universal jurisdiction and the question of the immunity of State officials. Universal jurisdiction should be limited to the most serious crimes of concern to the international community and should be identified and agreed upon by all States. In her delegation's view, universal

jurisdiction covered only the core crimes of genocide, crimes against humanity and war crimes.

22. Universal jurisdiction should be applied with much caution and within a well-established framework in order to avoid any abuse that might violate the principles of sovereign equality, political independence and non-interference in the internal affairs of other States. It should also be supplemental to other jurisdictions with a stronger link to the crimes, such as territorial jurisdiction or nationality jurisdiction, since primary responsibility for investigating and prosecuting crimes lay with the territorial State or the State of nationality. Moreover, a State should exercise the principle over a crime only when the alleged perpetrator was present in its territory, and it must do so in compliance with universally recognized standards of human rights and international humanitarian law.

23. **Mr. Edu Mbasogo** (Equatorial Guinea) said that universal jurisdiction was a principle of international law intended to prevent impunity and ensure that the perpetrators of serious crimes such as war crimes and crimes against humanity were brought to justice. However, the abuse of that principle by certain States, which were setting themselves up as the world's policemen, posed a threat to international law itself. The two international warrants issued by French judges in 2012 for the arrest of the Second Vice-President of Equatorial Guinea in the so-called "illicit enrichment" case constituted a clear example of the politically motivated abuse of universal jurisdiction against African interests. Although the International Criminal Police Organization (INTERPOL) had blocked dissemination of the warrants on the grounds that their circulation would constitute a breach of its strict principle of neutrality, the French courts had continued to violate international law by authorizing a raid on and seizure of the headquarters of the Permanent Delegation of Equatorial Guinea to the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris, as well as the confiscation and illegal sale of assets belonging to the State of Equatorial Guinea and to its Second Vice-President, notwithstanding the absolute immunity from criminal jurisdiction that they enjoyed under international law.

24. Though all international warrants should be executed in accordance with international law, those issued by African judges were not executed in any non-African State. For example, Equatorial Guinea had issued an international warrant for the arrest and extradition of Mark Thatcher, a British national who had instigated and perpetrated mercenary terrorist acts against the State of Equatorial Guinea. Although his involvement in those crimes was well known, and he had admitted to them during his trial in South Africa, he had not been arrested or extradited to Equatorial Guinea.

25. **Mr. Kamau** (Kenya) said that the scope and application of the principle of universal jurisdiction on the basis of domestic legal rules and emerging judicial practice was controversial and a source of concern to many States. Unless the principle was carefully defined and regulated within acceptable norms and in keeping with the other principles of international law, its unilateral, selective and arbitrary application by States and international institutions could threaten national stability, democracy, and international peace and security. The primary responsibility to exercise jurisdiction lay in all cases with the territorial State; extraterritorial jurisdiction should be invoked as a secondary means when States were unwilling or unable to exercise their national jurisdiction. The double standards and overt politicization evident in the use of universal jurisdiction should be a matter of concern to the entire international community.

26. Where the principle of universal jurisdiction was applicable, it should be exercised fairly, uniformly and consistently, without abuse or selectivity, in good faith and in a manner consistent with other principles of international law, maintaining the rule of law and guaranteeing impartial, prompt and fair trials. States should seek acceptable means of applying it without violating the essential principles of international law that governed relations among them. The lack of a common understanding of the scope and application of universal jurisdiction would undermine the rule of law at the international level. Given that international law should be the sole foundation for addressing global issues, the United Nations was the venue with the broadest legitimacy for addressing the divergent views on the type and range of crimes that could be subject to that principle.

27. The concept of universal jurisdiction was distinct from the work of the International Criminal Court, which was complementary to national criminal jurisdictions and ensured that effective prosecution measures were taken at the national level in respect of the most serious crimes of concern to the international community, with enhanced international cooperation

and, where necessary, capacity-building. The preamble of the Rome Statute, while recognizing the primacy of national criminal jurisdictions, recalled that it was the duty of every State to exercise its criminal jurisdiction over the perpetrators of serious crimes. However, that court's superficial, erroneous and politically motivated interpretation and implementation of the Rome Statute in relation to Kenya was highly prejudicial to the national, regional and international interests of that country, which was an active, cooperating State party with a rich history of local jurisprudence. The International Criminal Court could not render justice if it disregarded the views of African States, failed to respect their sovereign institutions and failed to hold non-African States accountable.

28. The international justice system must respect the interdependence of peace, security and justice. The international community should therefore refrain from adopting a narrow and agenda-driven interpretation of the role of universal jurisdiction that excluded other processes relevant to international and national peace. Instead, it should advocate an inclusive and carefully calibrated international justice system with clear benchmarks, transparency and achievable standards, and should be willing to examine and amend the system in order to respond to the complexity of current global democracies and social realities. There was a need to build on the gains of reconciliation rather than simply meting out punishment. In that regard, the application of universal jurisdiction should not be an end in itself but part of a process towards lasting peace.

29. **Mr. Maope** (Lesotho) said that the absence of a common definition of universal jurisdiction had led to uncertainty about when the principle should be invoked and what crimes it covered. It was frequently perceived to be applied selectively and abusively. A precise, universally agreed definition of the principle, including the conditions for its application and the nature of the crimes to which it applied, was therefore essential. In applying the principle, it was important to take account of other well-established rules of international law, including the sovereign equality of States, territorial jurisdiction and the immunity of State officials. Moreover, the principle must not be used as a political weapon to undermine the sovereignty of weaker States and the legitimate right of State officials to immunity. While the principle of universal jurisdiction, when used in good faith, was a powerful tool for preserving the international community's fundamental values, protecting and promoting the rule of law and human rights and combating impunity, due caution must be exercised each time it was invoked.

30. The principle of universal jurisdiction gave States the authority to prosecute perpetrators of the gravest crimes of international concern, regardless of where the crime was committed or the nationality of the perpetrator or of the victim. However, no State could exercise criminal jurisdiction over crimes committed in the territory of another State unless it had some link with either the offender or the victim, or unless the crime was universally recognized or established under a treaty and the territorial State was unwilling or unable to prosecute. The principle of universal jurisdiction must be clearly distinguished from the obligation to extradite or prosecute (*aut dedere aut judicare*). In that regard, his delegation welcomed the International Law Commission's consideration of the relationship between those two concepts.

31. At the current stage, his delegation favoured continued discussion of the topic, particularly within the Working Group, in order to identify issues on which there was a common understanding and those that required further study, taking due account of the emergence of new treaties, State practice, judicial decisions and juristic writings that might provide greater clarity and substance.

32. **Mr. Musayev** (Azerbaijan) said that the application of the principle of universal jurisdiction helped to strengthen the rule of law at the national and international levels and was an important tool in combating impunity. Important steps, including the development of international jurisprudence, had been taken at the national and international levels to prevent and punish wrongdoing. While a number of treaties provided for jurisdiction in respect of various offences, State practice in general appeared to permit the application of universal jurisdiction only in the case of war crimes, crimes against peace and crimes against humanity.

33. Governments bore primary responsibility for ensuring accountability for serious crimes; universal jurisdiction should be regarded as a supplementary tool when the relevant national authorities failed to take action and existing international judicial mechanisms could not be invoked. The application of the principle was particularly important in situations of armed conflict, including those involving prolonged foreign

military occupation, since past wrongs left unpunished and unrecognized hindered progress towards peace and reconciliation and could play a key role in the emergence of new conflicts and the commission of new crimes. Efforts to ensure accountability must be free of selectivity and political motivation.

34. His delegation urged the Committee to continue its examination of the topic and viewed the establishment of a Working Group as a positive development. At the same time, it also saw the need for a comprehensive legal study, with the possible involvement of the International Law Commission in that regard.

35. **Mr. Zappalà** (Italy) said it was positive that the principle of universal jurisdiction was unanimously recognized as a fundamental tool for bringing the perpetrators of heinous crimes to justice. Although some delegations had criticized the exercise of universal jurisdiction in certain cases, they seemed to favour its more widespread use in other cases where an impunity gap existed, for example, as an alternative to extradition. International cooperation, and in particular judicial cooperation, was key in that regard.

36. Although there were still some differences of opinion concerning the crimes that were subject to universal jurisdiction, it was broadly accepted that the concept came into play when fundamental values of the international community were breached. Treaties codifying international norms had recognized the principle of universal jurisdiction for a number of extremely serious international crimes. Custom and treaties were mutually reinforcing factors that came into play in the application of universal jurisdiction at the national level, although in many cases the existence of an international convention played a decisive role. In Italy, for example, article 7 (5) of the Criminal Code permitted the exercise of universal jurisdiction when that was provided for by international treaties.

37. The topic needed to be studied in greater depth, with the examination of concepts from several branches of international law, including international humanitarian law and human rights law, criminal law and criminal procedure. More specifically, consideration should be given, inter alia, to the relationship of universal jurisdiction with the principles and rules on the independence and impartiality of prosecutors and judges; its links with the national procedural systems of States, in relation to the concepts of mandatory or discretionary prosecution; the links between universal jurisdiction and mechanisms of international cooperation; and the role of victims as plaintiffs in some national systems.

38. While the Secretary-General's reports on the scope and application of the principle of universal jurisdiction were informative, it might be helpful for the International Law Commission to conduct a more complex analysis of the topic, as had been proposed by some other delegations. Additional work by the Committee, including through the Working Group, would also be important.

39. **Ms. Dilogwathana** (Thailand) said that the exercise of universal jurisdiction over serious crimes of international concern could be a valuable means of eliminating impunity, since application of the principle provided a legal platform for States to act beyond their treaty obligations. With the exception of piracy, there was still no consensus on the *ratione materiae* of the crimes that were subject to universal jurisdiction, which left room for States to define and apply the principle based on their domestic law. The ambiguity of the definition and scope of universal jurisdiction in international law allowed the perpetrators of certain serious crimes to enjoy safe haven. Persons committing serious crimes that did not fall within the scope of universal jurisdiction should therefore be prosecuted in the States in whose territory the crimes had been committed or those where the perpetrators were present. The application of the principle of universal jurisdiction should not be politically motivated and should be consistent with other principles and rules of international law.

40. To better understand the concept and scope of universal jurisdiction, a distinction should be drawn between the jurisdiction of international tribunals over treaty crimes such as genocide, torture and slavery and the jurisdiction of national courts over the crimes that customary international law recognized as being subject to universal jurisdiction, as well as between the obligation to extradite or prosecute as required by international treaties and the obligation to extradite or prosecute as required by application of the principle of universal jurisdiction. In that connection, her delegation wished to draw attention to the judgment of the International Court of Justice in the *Arrest Warrant* case, where in a joint separate opinion, Judges Higgins, Kooijmans and Buergenthal had called on the international legal community to reconsider the scope

and application of the immunity of State officials and exceptions to it when establishing jurisdiction over foreign State officials. Both the legal and political aspects of that issue should be thoroughly examined.

41. Thailand was committed to ending impunity. As well as assuming jurisdiction in respect of piracy, its national courts exercised extraterritorial jurisdiction over certain crimes under treaties to which it was a party and its Government also complied with the obligation to extradite or prosecute contained therein.

42. **Mr. Muhumuza** (Uganda) said that it was important for the international community to agree on the scope and application of the principle of universal jurisdiction; the establishment of the Working Group was a positive development to that end. Uganda was committed to combating impunity, having been the first country to refer a case to the International Criminal Court and having surrendered fugitives from international jurisdiction to the appropriate tribunals on many occasions. Thus, its concerns regarding the scope and application of universal jurisdiction should not be taken to suggest that it wished to shield the perpetrators of heinous crimes from accountability.

Organization of work

43. **The Chair** recalled that the Committee had established two working groups during its 2nd meeting but had deferred the election of their chairs. He understood that there was general support for Mr. Nikolas Stuerchler Gonzenbach (Switzerland) to chair the Working Group on responsibility of States for internationally wrongful acts and for Mr. Thembile Joyini (South Africa) to chair the Working Group on diplomatic protection, and he took it that the Committee wished to elect them.

44. *It was so decided.*

The meeting rose at 11.30 a.m.